

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SALVATORE GENTILE and U.S. POSTAL SERVICE,  
POST OFFICE, Bronx, NY

*Docket No. 99-1735; Submitted on the Record;  
Issued August 25, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof to establish that he sustained a recurrence of disability beginning January 23, 1997 due to his August 4, 1994 employment injury.

On August 4, 1994 appellant, then a 38-year-old letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained an injury when walking down brick steps which gave way, causing appellant to fall, twisting his ankle and bruising his left elbow. The Office of Workers' Compensation Programs accepted that appellant sustained an employment-related lumbosacral sprain, contusion of the left elbow and sprain of the right ankle. The appellant stopped work on August 4, 1994 and received continuation of pay from August 5 to September 11, 1994. Appellant returned to light-duty work on September 12, 1994 and, thereafter, worked various periods of light and regular duty.

Accompanying appellant's claim were emergency room notes dated August 4, 1994, attending physicians reports prepared by Dr. Richard Memoli, an orthopedic surgeon, beginning August 9, 1994. The emergency room notes dated August 4, 1994, noted x-rays of appellant's left elbow, right foot and right ankle which indicated no fractures, but soft tissue swelling of the ankle. Dr. Memoli reports from August 9 to December 20, 1994 diagnosed lumbosacral strain, sprain of right ankle and contusion of the elbow. He recommended appellant stay off work until September 12, 1994, then return to light duty. In a November 12, 1996 report, Dr. Memoli indicated that appellant could perform his regular work.

On February 11, 1997 appellant filed a CA-2, notice of recurrence of disability.<sup>1</sup> He indicated a recurrence on January 23, 1997, noting that he was having trouble standing and walking since the employment-related injury of August 4, 1994. Appellant stopped work on January 24, 1997 and returned February 13, 1997 to a limited-duty position.<sup>2</sup>

By letter dated February 26, 1997, the Office informed appellant that he must provide a statement regarding any possible change in his light-duty job such that appellant would be unable to perform these duties and a narrative report from a physician, which describes objective findings which show that appellant's condition prohibits appellant from performing the light-duty job.<sup>3</sup> The Office also requested information from the employing establishment regarding the appellant's job description, including any limited-duty assignments.

In a medical report dated January 27, 1997, Dr. Memoli indicated that appellant presented with persistent complaints of pain in the low back and right foot, with an objective finding of swelling and tenderness of the right foot. He indicated restricted range of motion of the lumbosacral spine with paraspinal tenderness and tenderness and redness down the right foot. Dr. Memoli recommended appellant be placed on restricted duty.

The employing establishment submitted a position description as well as a note that appellant resumed regular duty on September 5, 1996. The employing establishment advised that appellant was working full duty prior to his claimed recurrence of disability and that appellant returned to a light-duty job on February 13, 1997 where he worked until he was removed from the employing establishment on February 28, 1997.

In a decision dated January 16, 1998, the Office denied appellant's claim for recurrence of disability on the grounds that he did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on or about January 23, 1997 which was causally related to the accepted employment injury sustained August 4, 1994.<sup>4</sup>

Appellant requested a reconsideration of the Office decision dated January 16, 1998. Appellant's attorney submitted a brief and additional medical evidence. The medical evidence consisted of two medical reports prepared by Dr. Memoli dated March 23 and

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<sup>1</sup> A memorandum dated February 3, 1997, indicated appellant was involved in an automobile accident on December 30, 1996, in the course of his employment. After a complete investigation it was determined that appellant was at fault in the accident. By notice dated January 22, 1997, appellant was notified that he would be removed from the postal service on February 28, 1997 for failure to operate a motor vehicle safely.

<sup>2</sup> The employing establishment indicated an intent to controvert appellant's claim for recurrence. The employing establishment indicated a belief appellant's recurrence claim was initiated as a result of the employing establishment's decision to remove appellant from service on February 28, 1997.

<sup>3</sup> In an investigative memorandum dated March 10, 1997, the employing establishment noted that on February 21, 1997 appellant was arrested for purchasing narcotics while on duty. Appellant was placed on immediate suspension and thereafter terminated effective February 28, 1997 due to disciplinary reasons.

<sup>4</sup> In a letter dated December 4, 1997, the employing establishment documented a November 27, 1997 letter from appellant's attorney, which indicated that appellant was pursuing a third party damage claim arising from an injury on August 4, 1994. Matters pertaining to the third party claim are not presently before the Board.

September 24, 1998. Dr. Memoli's report of March 23, 1998, indicated a history of the injury noting appellant's persistent complaints of back and right ankle pain with positive physical findings. He noted restricted range of motion and tenderness of the lumbar spinous processes and paravertebral spasms. Dr. Memoli diagnosed a sprain of the left elbow and right ankle, chronic lumbosacral spine sprain and morbid obesity and advised appellant to remain off duty. He opined that, based upon his findings and evaluation, appellant's conditions were causally related to the August 4, 1994 accident. Dr. Memoli's report of September 24, 1998 revealed appellant still experienced persistent complaints of the back and right ankle. He noted appellant continued to show no significant improvement in his condition. Dr. Memoli related appellant's condition to his work injury and opined that appellant was permanently and totally disabled.

By merit decision dated January 28, 1999, the Office denied modification of the January 16, 1998 decision.

The Board finds that the evidence fails to establish that appellant sustained a recurrence of disability beginning on January 23, 1997 as a result of his August 4, 1994 employment injury.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.<sup>5</sup>

Appellant argues that the medical evidence in the record establishes that appellant's recurrence of total disability on January 23, 1997 is causally related to the employment injury of August 4, 1994. In support of his claim, appellant submitted two medical reports from Dr. Memoli, March 23 and September 24, 1998. Dr. Memoli's report of March 23, 1998, provides a history of his course of treatment starting August 9, 1994 and opined that appellant's conditions were work related and disabling. Dr. Memoli noted treating appellant on January 27, 1997, shortly after appellant filed the recurrence claim. He noted appellant complained of persistent pain in the low back and right foot, however, he did not provide an explanation as to when the recurrence of disability began or any medical rationale in support of his opinion on causal relationship. Dr. Memoli indicated appellant should be returned to regular duty but as a modified letter carrier. He did not explain how and why appellant's disability beginning on a specific date was causally related to appellant's 1994 work injury in light of appellant's preexisting conditions such as obesity and a heart murmur.

Dr. Memoli's report dated September 24, 1998, indicated that appellant remained symptomatic and he again opined that appellant's condition was work related. However, Dr. Memoli did not indicate a specific date of a recurrence of disability nor did he note a particular change in the nature of appellant's physical condition, arising from the employment injury, which prevented appellant from performing his light-duty position. This report, like the

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<sup>5</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

March 23, 1998 report is vague regarding the time of the onset of the claimed recurrence of disability and is unrationalized regarding how the 1994 employment injury would have caused a particular period of disability beginning in January 1997.<sup>6</sup>

Appellant has not met his burden of proof in establishing that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the light-duty requirements which would prohibit him from performing the light-duty position he assumed after he returned to work.<sup>7</sup>

The decision of the Office of Workers' Compensation Programs dated January 28, 1999 is hereby affirmed.<sup>8</sup>

Dated, Washington, D.C.  
August 25, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>6</sup> See *Theron J. Barham*, 34 ECAB 1070 (1983) (where the Board found that a vague and unrationalized medical opinion on causal relationship had little probative value).

<sup>7</sup> As appellant was removed for cause by the employing establishment on February 28, 1997, this would not constitute a change in the nature and extent of light-duty requirements. The record indicates that light duty would have remained available to appellant had he not been terminated for cause; see *John W. Normand*, 39 ECAB 1378 (1988).

<sup>8</sup> With appellant's request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; see 20 C.F.R. § 501.2(c).